

NO. 34986-8-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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MICHELLE WATERMAN and DARELL W. WATERMAN, wife and husband,

Appellants,

vs.

CALVIN LEE and "JANE DOE" LEE, husband and wife,  
and the marital community comprised thereof,

Respondents.

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APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
Honorable Sergio Armijo, Judge

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BRIEF OF RESPONDENTS

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FILED  
COURT OF APPEALS  
DIVISION II  
JAN 29 AM 8:59  
STATE OF WASHINGTON  
BY DEPUTY

PM 1/25/07

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## **I. NATURE OF CASE**

The case arises out of a motor vehicle accident that occurred on March 19, 2004. Defendant Calvin Lee's car rear-ended the vehicle that plaintiff Michelle Waterman was driving. Plaintiff was diagnosed with a neck strain, low back strain, and a left biceps contusion. However, plaintiff had almost total resolution of her symptoms six months following the accident. While plaintiff claimed lost wages, she continued to work as a general contractor. She resumed her extracurricular activities and played softball and pickleball a few months following the accident.

Plaintiff and her husband sued Mr. Lee. Mr. Lee admitted liability and that plaintiff had incurred \$11,892.31 in medical expenses. The case proceeded to a jury trial where the plaintiffs were awarded \$11,892.31 in economic damages and \$12,000 in noneconomic damages. Plaintiffs have appealed. This court should affirm.

## **II. RESTATEMENT OF ISSUES**

1. Should this court decline to consider plaintiffs' challenge to the court's procedure regarding questions posed by jurors where plaintiffs failed to preserve this issue in the trial court?

2. Did the trial court properly exercise its discretion in its procedure permitting jurors to question witnesses pursuant to CR 43(k)?

3. Is plaintiffs' claim that the court appeared biased or prejudiced without merit where plaintiffs cannot demonstrate how the court was biased in any way?

4. Did plaintiffs fail to preserve the issue of allowing the use of illustrative exhibits during the testimony of the defense expert?

5. Did the trial court properly exercise its discretion in allowing the use of illustrative exhibits during the testimony of the defense expert where the exhibits summarized evidence that had previously been admitted and were used for illustrative purposes only?

6. Should this court decline to consider plaintiff's ineffective assistance of counsel claim where a plaintiff does not have a right to constitutional effective assistance of counsel in a civil matter?

7. Should this court impose sanctions against plaintiffs for filing a frivolous appeal?

### **III. STATEMENT OF FACTS**

#### **A. FACTS OF ACCIDENT.**

This case involves a three-car accident that occurred on March 19, 2004. CP 4. Plaintiff Michelle Waterman was traveling eastbound on Canyon Road in Pierce County, Washington and was stopped behind another vehicle. CP 15. Calvin Lee was traveling in the same direction

when he rear-ended her vehicle. *Id.* Plaintiff then rear-ended the vehicle that was stopped in front of her. CP 4.

**B. PLAINTIFF’S MEDICAL TREATMENT FOLLOWING ACCIDENT.**

Plaintiff claimed left upper arm pain, neck pain, and low back pain following the accident. *See* Ex. 2. She was treated at the Good Samaritan Emergency room where she was diagnosed with neck strain, low back strain, and a left biceps contusion. RP 40; Ex. 2. She was discharged from care and referred to her primary care physician. *See* Ex. 2.

Plaintiff received chiropractic treatment and massage therapy for six months. RP 40. In June 2004, she also saw a neurologist for some bilateral hand numbness. *See* Ex. 8. She was given trigger point injections to treat her pain. *Id.* Plaintiff resumed playing softball and pickleball in June or July 2004. RP 105-06, 112-13, 306-07.

Her care was concluded with “very good results” in September 2004, six months following her accident. RP 41. A report from her neurologist provided that she had almost total resolution of her symptoms at that time. *See* Ex. 8.

Plaintiffs Michelle and Darell Waterman filed a lawsuit against Mr. Lee. The case proceeded to jury trial on May 8, 2006. RP 5. Liability was not disputed. At trial, Mr. Lee did not dispute \$11,892.31 in plaintiff Michelle Waterman’s medical expenses.



**C. PLAINTIFFS' WAGE LOSS CLAIM.**

Ms. Waterman testified that she lost wages and lost a contract with a customer as a result of the accident. RP 197-98. Ms. Waterman, a general contractor, and her husband own a construction business called Home Builders Northwest, Inc. RP 133, 162, 223. Ms. Waterman's duties involve administrative tasks including bookkeeping and accounting while Mr. Waterman's duties involve framing and construction. RP 129, 162.

Ms. Waterman testified that she lost approximately \$48,647 in general contracting fees in 2004. RP 197. Ms. Waterman arrived at that figure by averaging the general contracting fees she earned in 2003 and 2005 and then, subtracting the amount she earned in 2004. RP 196-197. Ms. Waterman testified that she made about \$69,000 in 2003 and \$85,855 in 2005 (RP 195-196) and that the average between those two years is \$77,485. RP 197. In 2004, plaintiffs made \$28,838 in general contracting fees. RP 196. Ms. Waterman testified that she lost \$48,647, the difference between the average and her reported earnings in 2004. RP 197.

In addition to \$48,647, Ms. Waterman testified that she lost a \$42,000 contract because of the accident. RP 197. Jan Hedberg, an engineer technician for Pierce County, testified on behalf of the plaintiffs.

RP 85-86. Ms. Hedberg testified that she wanted to build a home in Mason County and had previously asked Ms. Waterman to bid on the project. RP 88. According to Ms. Hedberg's testimony, she ultimately retained another contractor to build her house because Ms. Waterman was injured in the accident. RP 90-91.

Ms. Waterman testified that she lost a total of \$90,647 in lost wages as a result of the accident. RP 197.

**D. THE TESTIMONY OF DEFENSE EXPERT WILLIAM PARTIN.**

William Partin, a certified public accountant and forensic economist, testified on behalf of Mr. Lee. RP 213-14. Prior to his testimony, Mr. Lee presented plaintiffs with some charts that he intended to use during Mr. Partin's testimony. The plaintiffs objected to some of the charts that the defense intended to use on the grounds that they were "either new or there's no information on them." RP 176.

Mr. Lee's counsel explained that the charts included information from documents that were previously admitted by the court. The charts were merely summaries of information that was provided by plaintiffs. RP 176. Counsel reiterated the fact that the graphs and diagrams were being used for illustrative purposes only and would not go to the jury room. RP 176.

The court overruled plaintiffs' objection and permitted the use of the illustrative exhibits. RP 177. The court further indicated that plaintiffs would be allowed the opportunity to cross-examine Mr. Partin. RP 177.

Mr. Partin testified that his review of plaintiffs' financial records does not support plaintiffs' wage loss claim. RP 220. He reviewed the invoices from Home Builders Northwest, which revealed that the level of business activity actually increased after the accident. RP 238-39. Furthermore, checks were being written, deposits were being made, and bills were being paid from plaintiffs' bank account indicating a lack of decline in business activity as a result of the accident. RP 241-42.

Mr. Partin testified that the decline in plaintiffs' contracting fees in 2004 was due to the shift in plaintiffs' business plan. RP 221-22. According to Mr. Partin, plaintiffs started building more speculative homes rather than contracting custom homes. RP 221-22.

Mr. Partin also testified that plaintiffs did not lose the Hedberg contract because of the accident. RP 245-46. Contrary to plaintiffs' representation, plaintiffs had been working on another contract when Ms. Hedberg decided to go with another contractor. RP 243-45. In April 2004, plaintiffs signed the Larson contract for \$50,000, the largest contract that the company had ever had. RP 243-45. Based on his review of

plaintiffs' financial records, Mr. Partin opined that there was no evidence of wage loss following the accident. RP 251.

**E. QUESTIONS FROM THE JURY.**

Prior to trial, the court and counsel discussed how to proceed with questions from the jury. RP 38. Plaintiffs' counsel suggested two ways to handle questions from the jury:

In every trial that I've had, and I've seen it done two ways, I've seen it to where at the end of redirect of a witness, then you would ask if anybody has got questions. And then the individual juror or jurors would be given a question form. I've also seen it where all of them are given the question forms and if they have any questions, to write on it. Then everybody hands in their form, even if it's blank.

RP 38.

The court responded as follows: "They will have the note pads. If they want to ask questions, they can write it out and then we'll sidebar."

RP 38. Plaintiffs did not object to this method of handling questions from the jury. RP 39.

At the commencement of trial, the court instructed the jury as follows:

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony...

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by

the court. Do not sign the question. I will review the question to determine if it is legally proper.

There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. **If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.**

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

WPIC 1.01; CP 134 (emphasis added); *see* Appellants' Brief at pp. 7-8;

RP 38-39. Plaintiffs did not object to giving this instruction.

During trial, jurors had approximately 30 questions for seven witnesses. CP 123, 164-65, 166-70, 198-203; RP 52, 78, 101-04, 112, 159, 271, 320. The court held side-bars whenever the jurors submitted written questions. RP 52, 78, 112, 159, 320. The court allowed most questions and disallowed 5 of their questions after determining that they were improper questions. RP 52, 320; CP 123, 198, 200-02.

Carol Zornes testified on behalf of the plaintiff. She is a licensed massage therapist who treated plaintiff from March to September, 2004. RP 60-62. She also testified that she knew Ms. Waterman because they had been neighbors in the past and they were friends. RP 61. Following

the testimony of Carol Zornes, the court allowed the following questions from the jurors:

- (1) What did you say was your hourly salary in your work for Apple Physical Therapy?
- (2) Did the witness, Ms. Zornes, gain a benefit, financial or otherwise from Apple Physical Therapy for bringing clients to their business?

RP 78-79; CP 164-65.

The jury also had questions for Ms. Janet Hedberg. Ms. Hedberg is an engineer technician for Pierce County Planning and Land Services. RP 86. She testified that she became acquainted with Ms. Waterman after inspecting several buildings that Ms. Waterman had worked on. RP 86-87. Ms. Hedberg had initially asked Ms. Waterman to build a house for her but decided to retain another contractor after learning that plaintiff was recovering from her alleged injury. RP 91.

Following Ms. Janet Hedberg's testimony, the court allowed the following juror questions:

- (1) Jan, you spoke of Ms. Waterman's physical condition when you saw her the day after the accident. Could you please tell me about her physical condition when you saw her the day you picked up your plans after your letter of May 8? RP 101-03; CP 170
- (2) You signed a contract with a general contractor to build your home on April 27, 2004. When did you meet the new contractor and when did you receive the new contractor's bid? RP 104; CP 169.

Andrea Gustason also testified on behalf of plaintiff. RP 105. She testified that she and plaintiff have played softball together and that plaintiff missed a few softball games in late May or early June 2004. RP 105-06. However, plaintiff resumed playing softball after missing only a few games. RP 106.

Following Andrea Gustason's testimony, the court allowed the following question:

(1) Andrea, to the best of your recollection, when did Michelle return to playing softball with your team the summer of [20]04? RP 112; CP 168.

Plaintiff Darrell Waterman testified that he owns Home Builders Northwest with his wife. RP 133, 135. He testified that Ms. Waterman was able to continue doing administrative tasks from her own office following the accident, but was unable to do work outside of her home. RP 142.

The following questions were permitted after Darrell Waterman's testimony:

(1) Does Michelle ever do any physical work on the house job sites and, if so, what exactly does she do? RP 160; CP 167.

(2) Has she been able to do any physical work at job sites since the accident? RP 160; CP 167.

(3) Has the nature of Michelle's work in your home builder construction company changed since the accident? RP 160; CP 167.

Following Ms. Waterman's testimony, the court allowed the following questions from the jury:

- (1) Explain the difference between a custom home and a "spec" home. RP 320; CP 203.
- (2) Is there any projects that you were unable to bid on or get, due to the accident, other than Hedberg? If so, how many? RP 321; CP 199.
- (3) How long, approximately, does it take to submit a bid? RP 321; CP 201.
- (4) When approximately was the bid submitted for the Larson house? RP 322; CP 201.
- (5) When did you begin playing softball, approximately? And then, how many years have you played softball? RP 322; CP 201.
- (6) On average, how many days, weeks, hours a day were you at the Larson project? By that I mean physically on the job site, not working on the project in your home office. RP 323; CP 201.
- (7) How much was the general contracting fee for Sunset acres, Lot no. 5, not the profit just the contracting fee alone? RP 323; CP 201.
- (8) When, approximately, did framing begin for the Larson project? RP 323; CP 201.
- (9) When approximately did Larson ask for the bid? RP 324; CP 201.
- (10) When did you approximately begin the permit process for Larson's? RP 324; DP 201.
- (11) In 2003, your general contractor invoices total \$48,500, yet your chart shows your general contracting income of \$69,133, a difference of \$20,633. In 2005, the discrepancy is \$25,323. \$60,532 of billed invoices and



\$85,855 on the chart. Could you please explain these differences? RP 324-328; CP 200.

(12) How did you and Mr. Larson get together to do business? RP 329; CP 200.

The jury was allowed to ask Mr. Partin the following questions:

(1) Did Darell work only on homes contracted by Michelle? RP 271; CP 166.

(2) Did he ever do framing for other contractors? CP 166; RP 271.

Plaintiffs never objected to any of these questions.

The court did not allow 5 questions from the jury. The court did not allow one question that a juror asked Dr. Joel Vranna:

Why is this witness testifying when his only knowledge is after the fact and has never examined Ms. Waterman? RP 52; CP 123.

Dr. Joel Vranna is a chiropractor who testified on behalf of the plaintiff. RP 39. He testified to plaintiff's alleged pain and suffering, whether plaintiff was susceptible to reinjury in the future, and whether her time off work was reasonable. RP 41-45. On cross-examination, he admitted that he had never treated plaintiff and had only conducted a one-hour consultation with plaintiff approximately a week before trial. RP 46.

The jurors asked but the court did not submit the following questions to Ms. Waterman:

(1) Why haven't any of your "doctors" testified? CP 198;

(2) Did you file this suit before or after Mr. Lee declined to pay for the last amount of massage therapy? CP 200;

(3) When did, approximately, plaintiff seek representation for lost wages? CP 201; and

(4) How was your \$15K medical cost paid? Insurance coverage or self-insured? CP 202.

**F. JURY VERDICT.**

At the conclusion of trial, the jury awarded plaintiffs \$11,892.31 for past economic damages and \$12,000 for past and future noneconomic damages. CP 194.

**G. PLAINTIFFS' MOTION FOR A NEW TRIAL.**

On June 9, 2006, plaintiffs moved for a new trial. RP 372. Plaintiffs argued that they were entitled to a new trial for three reasons. First, the defendant allegedly introduced new information that had not been disclosed prior to trial. RP 372. Second, defense counsel's comment in her closing argument that Mr. Lee had "bought all the medical bills" was an improper statement. RP 372-73. According to plaintiffs, the word "bought" suggested that the insurance company paid off Ms. Waterman's medical bills. RP 373, 375. Finally, the jury verdict was inadequate because it did not award lost wages. RP 373.

Mr. Lee requested that the court deny plaintiffs' motion for a new trial. CP 216-17. Mr. Lee pointed out that the plaintiffs cannot demonstrate which exhibits were improperly offered or admitted during

trial. RP 373-74. Mr. Lee explained that the court's rulings on the evidence were proper. RP 374. Furthermore, defense counsel's comment that the defense "bought" medical expenses was proper as it is a common term meaning "to accept the truth or the feasibility of it.". RP 374. Mr. Lee informed the court that there is no indication from the record that the jury misunderstood the term. RP 375. Finally, Mr. Lee stated that the jury's award was adequate. RP 375.

The court denied plaintiffs' motion for a new trial. CP 221-22. The court found that defense counsel's comment that "we bought the medical" was not improper. RP 376. The court indicated that counsel was representing Mr. Lee rather than the insurance company when she used that term. RP 376.

The court also found that the jury verdict was supported by the evidence presented at trial. RP 376. The court stated that both parties presented their theories, and the jury chose to accept Mr. Lee's theory of the case. RP 376. According to the court, plaintiff testified that she lost approximately \$80,000 in wages as a result of the accident. RP 376. Plaintiff testified that she could not work and could not take Ms. Hedberg's contract because of her injuries. RP 376.

Mr. Lee brought in a defense expert, Mr. Bill Partin, who analyzed plaintiffs' employment records and tax forms and testified that plaintiffs'

financial records do not support a wage loss claim. RP 251, 376. According to Mr. Partin's testimony, plaintiffs underwent a change in their type of business. RP 376. Plaintiffs began constructing more speculative homes rather than contracting for custom homes. RP 221-22. Furthermore, Mr. Partin presented evidence that plaintiffs did not lose the Hedberg contract as a result of the accident because they had been working on another contract. RP 243-45, 376. The court denied plaintiffs' motion for a new trial. RP 376-77.

#### **IV. ARGUMENT**

##### **A. PLAINTIFFS DID NOT PRESERVE ANY CHALLENGE TO THE JUROR QUESTIONS.**

This court should decline to consider the plaintiffs' argument regarding the court's procedure regarding questions posed by jurors where plaintiff did not preserve this issue for appeal. Arguments not raised in the trial court generally will not be considered on appeal. RAP 2.5(a). The policy underlying RAP 2.5(a) is to promote the efficient use of judicial resources. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This goal is frustrated when the trial court is not given an opportunity to correct alleged errors and thereby avoid an appeal and a consequent new hearing or trial. *Postema v. Postema Enterprises, Inc.*, 118 Wn. App. 185, 193, 72 P.3d 1122 (2003), *rev. denied*, 151 Wn.2d 1011 (2004).

For instance, in *State v. Munoz*, 67 Wn. App. 533, 837 P.2d 636 (1992), *rev. denied*, 120 Wn.2d 1024 (1993), the Court of Appeals refused to review any potential error regarding the practice of juror questions where the defendant did not object to the procedure during the trial. The jury was instructed to write down any questions that they had for witnesses. Neither party objected to the court's instruction to the jury. A couple of jurors submitted questions following a witness's examination. The questions were reviewed by the attorneys who did not have an objection. No recess was taken upon the submission of the questions to allow counsel an opportunity to object outside the jury's presence. At another point in trial, the court did not permit a question after determining that the particular area of inquiry was irrelevant. The defendant was ultimately convicted of delivery of a controlled substance and appealed. On appeal, defendant argued the trial court erred by allowing juror questions. The court declined to address defendant's argument because he had failed to object to the procedure at the trial court. *Munoz*, 67 Wn. App. at 539. The Court of Appeals further reasoned that the procedure did not implicate an issue of constitutional magnitude to permit review under RAP 2.5(a). *see also State v. Williamson*, 247 Ga. 685, 279 S.E.2d 203, 204 & n.1 (1981) (failure to object below to the procedure of juror

questions and to any specific question precluded review of the merits on appeal; the issue did not involve constitutional rights).

For the first time in this appeal, plaintiffs challenge the court's procedure in allowing jury questions. However, plaintiffs never objected to this procedure below. Prior to trial, the court discussed the procedure of permitting jury to ask questions of witnesses. Both counsels agreed to the procedure. RP 38.

Second, the court instructed the jury regarding the procedure of asking questions following the testimony of each witness. *See Appellants' Brief* at p. 7; CP 134. The plaintiff did not object to this instruction.

Finally, the plaintiff never objected to any of the questions that were posed. The jury asked about 30 questions for seven witnesses during the trial. Following sidebars and discussion with counsel, the court allowed most of the questions to be asked of the witnesses and disallowed 5 questions as improper questions. The plaintiff never objected to the questions that were allowed. Plaintiffs failed to preserve this issue for appeal. Thus, this Court should decline to consider this issue on appeal.

**B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN PERMITTING JUROR QUESTIONS DURING TRIAL.**

CR 43(k) allows jurors to submit questions to witnesses during trial. CR 43(k) states as follows:

**(k) Juror Questions for Witnesses.** The court shall permit jurors to submit to the court written questions directed to witnesses. Counsel shall be given an opportunity to object to such questions in a manner that does not inform the jury that an objection was made. The court shall establish procedures for submitting, objecting to, and answering questions from jurors to witnesses. The court may rephrase or reword questions from jurors to witnesses. The court may refuse on its own motion to allow particular question from a juror to a witness.

Those courts considering the propriety of juror questions have concluded that it is a matter within the discretion of the trial judge. *DeBenedetto v. Goodyear Tire & Rubber Company*, 754 F.2d 512, 515 (4<sup>th</sup> Cir. 1985); *see also United States v. Callahan*, 588 F.2d 1078 (5<sup>th</sup> Cir.) *cert. denied*, 444 U.S. 826, 100 S. Ct. 49, 62 L. Ed. 2d 33 (1979); *United States v. Witt*, 215 F.2d 580 (2d Cir.), *cert. denied*, 348 U.S. 887, 75 S. Ct. 207, 99 L. Ed. 697 (1954).

In this case, the trial court properly exercised its discretion in allowing questions from the jury. Plaintiffs argue that the trial court abused its discretion because it did not excuse the jury from the courtroom after the questions were submitted to the court. Appellants' Brief at pp. 17-18. First of all, there is no authority to support plaintiffs' position that the jury must be excused from the courtroom following questions from the jury nor do plaintiffs cite to any authority to support that position. An appellate court need not review an issue unsupported by any authority.

*Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Thus, this Court should decline to consider this issue.

Second, both parties had sufficient opportunity to object to any jury question. The court held sidebars after the jurors submitted their questions in written form. The court further allowed the attorney calling the witness to ask the questions that were posed by the jurors. Both parties were given ample opportunity to object to any question posed by the jurors. Plaintiffs could have requested the court to excuse the jury from the court room if they wanted to make objections outside the presence of the jury. Plaintiffs chose not to do so.

Plaintiffs cite to standards provided by the American Bar Association in their brief. *See* Appellants' Brief at p. 17. These standards support Mr. Lee's position, not plaintiffs' arguments. According to plaintiffs, the ABA standards recommend that "outside the presence of the jury, counsel are given the opportunity to make objections to the question or to suggest modifications to the question, by passing the written question between counsel and the court during a **side-bar conference** or by excusing jurors to the jury room." Appellants' brief at p. 17 (boldface emphasis added; italics omitted). As recommended by the ABA, here, the trial court held side-bar conferences after the jurors submitted their questions. Plaintiffs have not articulated how the trial court abused its



discretion in allowing the questions nor have they demonstrated that the questions were prejudicial to their case. Consequently, the trial court's procedure in permitting questions from the jury was appropriate.

**C. THE PLAINTIFFS' ALLEGATION THAT THE COURT APPEARED BIASED AND PREJUDICED IS WITHOUT MERIT.**

This state has long adhered to the "appearance of fairness" doctrine. *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (quoting *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)); see *In re Custody of R.*, 88 Wn. App. 746, 762-63, 947 P.2d 745 (1997) (justice must satisfy the appearance of impartiality). "Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit." *Post*, 118 Wn.2d at 619, 826 P.2d 172.

Generally, the appearance of fairness doctrine requires the court to inquire as to how the proceedings would appear to a reasonably prudent and disinterested person. *Chicago, Milwaukee, St. Paul, & Pac. R.R. Co. v. Washington State Human Rights Commission*, 87 Wn.2d 802, 810, 557 P.2d 307 (1976); *Brister v. Council of City of Tacoma*, 27 Wn. App. 474, 486-87, 619 P.2d 982 (1980), *rev. denied*, 95 Wn.2d 1006 (1981).

In this case, plaintiff argues that the court appeared biased because it sustained Mr. Lee's objections, admitted certain evidence into evidence, and disallowed certain evidence. However, plaintiffs do not cite to any part of the record where the court abused its discretion in its evidentiary rulings. Plaintiffs cannot demonstrate that the court was biased in any way. The record actually demonstrates that the court's evidentiary rulings were proper. *See* Appendix A. Plaintiffs' allegations that the court sustained every one of Mr. Lee's objections and never gave plaintiffs a chance to rebut Mr. Lee's objections with an explanation is a misrepresentation of what occurred during trial. As shown in Appendix A, the plaintiffs were permitted to rebut any objection with an explanation. Consequently, plaintiffs' argument is without merit.

**D. PLAINTIFF'S CHALLENGE TO THE USE OF ILLUSTRATIVE EXHIBITS DURING MR. PARTIN'S TESTIMONY IS NOT PRESERVED FOR APPEAL.**

This court should decline to review plaintiffs' challenge to the use of illustrative exhibits during Mr. Partin's testimony. Plaintiffs argue that the use of these exhibits violated CR 37 and ER 403. However, plaintiffs did not object on these grounds in the trial court.

A party may only assign error in the appellate court on the specific ground of evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d

412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

For instance, in *Reitz v. Knight*, 62 Wn. App. 575, 814 P.2d 1212 (1991), the court found that the appellant's argument challenging the use of an illustrative exhibit at trial need not be considered because he did not assert the same ground for exclusion at trial. The case involved a property boundary dispute. During one of the witness's testimony, the plaintiff introduced an exhibit. The defendant objected to the testimony on hearsay grounds, which was overruled by the trial court. On appeal, the defendant challenged the use of illustrative exhibit on the grounds that it failed to satisfy the business records exception to the hearsay rule. The court determined that plaintiff failed to preserve the issue because he did not assert this ground for exclusion at trial. *Reitz*, 62 Wn. App. at 584.

Similarly, in this case, this court should not review plaintiffs' challenge to the use of illustrative exhibits during the testimony of Mr. William Partin. Plaintiffs claim that the illustrative exhibits violate ER 403 and CR 37. However, plaintiffs did not object on these grounds in the trial court. Furthermore, plaintiffs did not mark or designate which illustrative exhibits that they are challenging on appeal. As a result, this Court cannot review whether these illustrative exhibits were improperly

admitted. Consequently, this court should decline to consider this issue on appeal.

**E. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE DEFENDANT TO USE ILLUSTRATIVE EXHIBITS DURING THE TESTIMONY OF PARTIN.**

Assuming *arguendo* that this Court decides to consider the merits of plaintiffs' challenge to the use of illustrative exhibits, the trial court properly exercised its discretion in allowing the use of illustrative exhibits during Mr. Partin's testimony. The use of demonstrative or illustrative evidence is favored and the trial court is given wide latitude in determining whether or not to admit demonstrative evidence. *State v. Lord*, 117 Wn.2d 829, 855, 822 P.2d 177 (1991). An appropriate illustrative piece of evidence aids the fact finder in understanding other evidence where the fact finder knows the limits on the accuracy of the evidence. *Lord*, 117 Wn.2d at 855.

"A summary 'can help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses throughout the trial.'" *Id.* The chart must be a substantially accurate summary of evidence properly admitted. *Id.* This does not mean, however, that there can be no controversy as to the evidence presented. *Id.* The jury is free to judge the worth and weight of the evidence summarized in the chart. *Lord*, 117 Wn.2d at 856 *citing*

*Epstein v. United States*, 246 F.2d 563, 570 (6<sup>th</sup> Cir.), *cert. denied*, 355 U.S. 868, 78 S. Ct. 116, 2 L. Ed. 2d 74 (1957).

When a summary or chart is used for illustrative purposes only and the jurors are instructed that the summary is not evidence, the summary should not go to the jury room. *McCartney v. Old Line Life Ins. Co. of Am.*, 3 Wn. App. 92, 93-94, 472 P.2d 581, *rev. denied*, 78 Wn.2d 995 (1970). It should be utilized during the initial presentation of testimony and/or in final argument by counsel. *McCartney*, 3 Wn. App. at 93-94.

In this case, the trial court properly exercised its discretion in allowing the defense to use illustrative exhibits during the testimony of defense expert William Partin. The graphs were summaries of invoices, plaintiffs' income tax returns from 2002-2005, payrolls, and contractor agreements. RP 228-29, 234, 238-39, 241, 248. Not only was this information produced by the plaintiffs, the evidence was previously admitted during the plaintiffs' case in chief. *See* Exs. 11-25.

Furthermore, these exhibits were used to aid the jury in their understanding of complex figures contained in plaintiffs' financial documents and relevant to plaintiffs' wage loss claim. Plaintiffs also used graphs for illustrative purposes during their testimony at trial. The graphs were used for illustrative purposes only and were not sent to the jury room.

Furthermore, plaintiffs had sufficient time to review the graphs that Mr. Partin used during his testimony. RP 177. The court allowed Mr. Partin to testify in the middle of Ms. Waterman's direct examination because there was a conflict in his schedule. RP 213. Ms. Waterman resumed her testimony **two days after Mr. Partin testified**<sup>1</sup>. RP 271, 284. Ms. Waterman addressed the information contained in Mr. Partin's illustrative graphs during her direct examination. RP 285. Consequently, plaintiffs had sufficient time to review Mr. Partin's graphs and challenge them in Ms. Waterman's testimony. Plaintiffs fail to articulate how the use of illustrative exhibits during Mr. Partin's testimony was prejudicial to their case. Consequently, the trial court properly exercised its discretion in allowing the use of illustrative exhibits during the testimony of Mr. Partin.

**F. A PLAINTIFF IN A CIVIL CASE DOES NOT HAVE A CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.**

Plaintiffs' ineffective assistance of counsel claim should not be reviewed on appeal. Plaintiffs argue that they are entitled to a new trial with competent counsel. However, the Sixth Amendment right to counsel

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<sup>1</sup> There was a one-day recess before Ms. Waterman resumed her testimony. RP 213. Mr. Partin testified on Tuesday, May 9, 2006. RP 213. Ms. Waterman resumed her direct examination on Thursday, May 11, 2006. RP 284. There was no trial on Wednesday, May 10, 2006. RP 271.

that forms the basis for ineffective assistance in criminal proceedings has no application in civil proceedings. See *In re Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004); *Nicholson v. Rushen*, 767 F.2d 1426, 1427 (9<sup>th</sup> Cir. 1985) (“[g]enerally, a plaintiff in a civil case has no right to effective assistance of counsel”). As this is a civil and not a criminal matter, plaintiffs cannot allege ineffective assistance of counsel. A plaintiff claiming negligent representation by an attorney in a civil matter may bring a legal malpractice claim against the attorney. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). The proper remedy would be to bring a legal malpractice claim against their trial attorney rather than claiming ineffective assistance of counsel in this case. Consequently, plaintiffs’ alleged ineffective assistance of counsel fails.

**G. THIS COURT SHOULD SANCTION PLAINTIFFS FOR A FRIVOLOUS APPEAL.**

RAP 18.9(a) states in pertinent part:

(a) **Sanctions.** The appellate court on its own initiative or on motion of a party may order a party or counsel... who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court . . . .

RAP 18.9(a). “An appeal is frivolous if, considering, the entire record, it has so little merit that there is no reasonable possibility of reversal and

reasonable minds could not differ about the issues raised.” *Johnson v. Jones*, 91 Wn. App. 127, 137-38, 955 P.2d 826 (1998).

Here, this court should sanction plaintiffs for bringing a frivolous appeal. Plaintiffs’ arguments are meritless. Plaintiffs raise issues that have not been preserved in the trial court. They cannot demonstrate that the trial court abused its discretion in its evidentiary rulings nor do they cite to any where in the record indicating that the trial court was erroneous in its rulings. Finally, plaintiffs raise an issue that is not applicable in civil cases. Based on these factors, there is no reasonable possibility of reversal. Reasonable minds cannot differ about the issues raised. Consequently, this court should find that the appeal is frivolous. This court should also impose sanctions in an amount that is appropriate to the court.

## **V. CONCLUSION**

Plaintiffs received a fair and full trial. The trial court’s procedure in permitting questions from the jury was proper and appropriate. Plaintiffs’ claim that the court appeared biased or prejudiced is not supported by any evidence. The trial court properly exercised its discretion in its evidentiary rulings. Finally, plaintiffs cannot raise a claim for ineffective assistance of counsel in a civil trial. Plaintiffs’ arguments are without merit. This court should affirm the trial court’s judgment and



order and impose sanctions against plaintiffs for bringing a frivolous appeal.

DATED this 25<sup>th</sup> day of January, 2007.

REED McCLURE

By

  
Marilee C. Erickson

WSBA #16144

Miry Kim

WSBA # 31456

Attorneys for Respondents

060349.099034/145997

## APPENDIX A

QUESTION	OBJECTION	RULING	PAGE	PARTY OBJECTING
Are you going to - -	I am going to object and ask that the witness be allowed to finish his answer before the next question is asked.	Objection denied. Ask him a question	RP 49	Plaintiffs
Okay. So you and your husband and Darell and Michelle Waterman bought property?	Objection, asked and answered. Can we move on?	Objection denied.	RP 71	Plaintiffs

Do you think the fact that his bank account is garnished for not paying child support and he's been taken to --	Objection, testifying, narration, facts not in evidence.	I'll sustain.	RP 54	Defendants
Are there any children involved?	Objection, relevance.	Sustained.	RP 55	Defendants
How many other female contractors do you know in Pierce County?	Objection, relevance.	I'll sustain.	RP 78	Defendants
Didn't I hear you earlier testify that you could have treated Michelle yourself and made 120 bucks an hour but you decided just to take 16 bucks an hour through your employer to keep that professional so you wouldn't have to face what you're facing right now?	Objection. Asked and answered on direct.	Sustained.	RP 79-80	Defendants

<p>Since 1990, how many female general contractors have you dealt with?</p> <p>I think this is a male dominated field and it might be difficult for a woman to break into that field. Maybe I'm wrong, maybe it's half women, I don't know.</p>	<p>Objection, relevance.</p>	<p>Relevance, counsel?</p> <p>I'll sustain the objection. Let's move on.</p>	<p>RP 87</p>	<p>Defendants</p>
<p>What part of the project do you come in to? Like a contractor is building a home, at the beginning, the middle, the end, all the way through?</p> <p>She asked if she was aware that my client signed another contract, as if you sign a contract and you break ground the next day. I'm trying to ask this witness if she know anything about the time frame.</p> <p>The relevance is that raises an issue in the jurors' mind, why could she sign some other contract and not sign Michelle Waterman's contract.</p>	<p>Objection outside the scope of cross.</p> <p>. . . So there's no relevance there.</p>	<p>Why?</p> <p>You can ask but I'm going to sustain the objection. There's no relevance.</p>	<p>RP 97-99</p>	<p>Defendants</p>

And the reason being is just because you sign a contract, doesn't mean you break ground the next day.				
You don't need to read it because that Exhibit 29 is part of a larger exhibit, which has already been admitted into evidence and the jurors will get all of those documents and I'll refer to the date. Well, is there?	Objection, narration.	Sustained	RP 109	Defendants
And how many other women general contractors do you deal with?  Don't Answer.	Objection, relevance?	Sustained.	RP 116	Defendants
And could you put like a percentage on it? Did it go to nonexistent, or in your own words, without any details, how was it affected? The reason I'm asking this is there's a loss of consortium that the jurors would have to --	Objection, narration.	Sustained. Questions, counsel	RP 143	Defendants
Darell did not suffer any injuries.	Objection, leading.	Objection denied.	RP 170	Defendants

And I thought you and I were going to ask the jurors to figure out what you should be awarded for your lost economic opportunity and income and business opportunity --  And it had nothing to do with --	Objection, narration.	I'll sustain. Ask the question, counsel.	RP 201	Defendants
Basically he's calling you a liar. How do you feel about that?	Objection. Argumentative.	Sustained. Don't answer.	RP 208	Defendants
Do you have some figures in mind as to what you try to attain, a range? Because, Michelle, if you don't tell the jurors some range, how do you expect them to go back in the jury room and come up with the figures themselves when --	Objection, narration.	Sustained. Question.	RP 319	Defendants
Pretty important -- let me ask you -- when you file something with the IRS?	Objection. This is going beyond the scope of the questions of the jury.	Sustained.	RP 328-29	Defendants

060349.099034/147685

MICHELLE WATERMAN and  
DARELL W. WATERMAN, wife and  
husband,

# AFFIDAVIT OF SERVICE BY MAIL

VS.

Respondents.

) SS.

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That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action and competent to be a witness therein; that on the date herein listed below, affiant deposited in the United States mail, postage prepaid, copies of the following documents:

- addressed to the following parties:

ORIGINAL

Annette L. Monnett  
1045 Buena Vista Avenue  
Fircrest, WA 98466-6706

Sara Leming  
Sara Leming

SIGNED AND SWORN to (or affirmed) before me on

Print Name: PATRICIA CLAMTON  
Notary Public Residing at 66 S. Shaw Ave.  
My appointment expires 10/29/10

